

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

YUDI IBARRA

Claimant

VS.

TYSON FRESH MEATS, INC.

Respondent

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Docket No. 1,043,430

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 17, 2010, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on October 15, 2010. Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent. Stacy Parkinson was appointed by Seth G. Valerius, the Acting Director, to serve as a Board Member Pro Tem in place of former Board Member Carol Foreman, who retired from the Workers Compensation Board.

The Administrative Law Judge (ALJ) found that the presumption in favor of permanent total disability in this case was overcome and that claimant is not permanently and totally disabled. The ALJ adopted the rating of the court-appointed independent medical examiner, Dr. Paul Stein, and found that claimant had a 21 percent permanent partial impairment to the right upper extremity at the level of the shoulder and a 21 percent permanent partial impairment to the left upper extremity at the level of the shoulder.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asserts the record shows that she is permanently totally disabled as a result of her injuries suffered while working at respondent. Claimant further asserts that the ratings and restrictions opinions of Drs. Stein and Brown are more credible than those given by Dr. Melhorn.

Respondent asks that the Board find Dr. Melhorn's impairment rating to be more credible than that of Drs. Brown and Stein. Respondent further contends that because Dr. Melhorn did not render a diagnosis of shoulder injury, Dr. Stein's impairment rating should be reduced to no more than 20 percent to each upper extremity, and the Board should find claimant's functional rating to be no more than that. In addition, respondent asserts that claimant is capable of engaging in substantial, gainful employment and, therefore, is not permanently totally disabled. Respondent also argues that the presumption of permanent total disability applies only in cases of permanent total loss of bilateral extremities, not in cases of permanent partial loss of use of bilateral extremities.

The issues for the Board's review are:

- (1) Is claimant permanently, totally disabled?
- (2) What is the nature and extent of claimant's functional disability?

FINDINGS OF FACT

Claimant began working for respondent in 1999. When she first started working there, she was trimming tongues. Then, in 2002, she reported she was having some pain, and her job was changed to a lighter job of placing plastic. She was able to perform that job without pain. Claimant did that job for about five years, but in April 2007, she was asked to cut tails. About a month later, she started to notice pain again. On May 30, 2007, she reported to respondent that she suffered injuries to her hands, elbows, shoulders and neck.

Claimant was sent to respondent's company physician, Dr. Garrett, who later referred her to Dr. Mark Melhorn. Dr. Melhorn performed surgeries on claimant's bilateral wrists and elbows and sent her to physical therapy. However, she testified that after her surgeries, her condition worsened and she now has constant pain in her shoulders and right arm and feels strong pinches at her right elbow. Claimant also has similar pain in her left arm, but it is not as strong. Claimant also described pain in both her hands.

Claimant said she has a problem trying to fix her hair because she has to keep resting her arms. She has a problem sleeping because of the pain. She has trouble carrying her young son because her hands hurt. Claimant has pain when she puts her elbows on a table. She has lost strength in her hands and now, when she does dishes, she has to do them intermittently because her hands start hurting. She has trouble cooking. Her hands hurt when she drives a car. She had none of these problems before working for respondent.

Dr. Mark Melhorn, a board certified orthopedic surgeon, first evaluated claimant on July 31, 2007. She complained of numbness and tingling in the thumb, index, middle, ring and little fingers on both hands, which she related to her work for respondent. After taking

a history and conducting a physical examination, Dr. Melhorn diagnosed her with painful right and left hand/wrist and neuropraxia. Dr. Melhorn provided claimant with medication, recommended she wear splints at night, and suggested physical therapy and nerve conduction testing.

Claimant returned on August 14, 2007. Her symptoms were persistent, and the results of her physical examination were unchanged. The nerve conduction testing indicated claimant had changes consistent with carpal tunnel and probable changes involving the ulnar nerve at the elbow. Dr. Melhorn recommended changes in claimant's physical therapy and exercises and provided injections about the nerves in her wrists. He also believed a wider and more complete nerve conduction study would be appropriate. This study was completed and revealed that claimant had entrapment of the nerves at the elbows in addition to carpal tunnel. Following that study, on September 4, 2007, claimant returned to Dr. Melhorn, at which time she elected to proceed with surgery.

Surgeries were performed by Dr. Melhorn on claimant's right carpal tunnel and right ulnar nerve on September 12, 2007, and on her left carpal tunnel and left ulnar nerve on September 25, 2007. After the surgery on the right, claimant reported to Dr. Melhorn that she had done well with the right, she had no neuropraxia or numbness, and her hand felt good. After the surgery on the left, however, she reported some discomfort along the left arm/chest area from the axillary block. With regard to the nerve entrapment, she reported she was doing fine. On October 9, 2007, Dr. Melhorn released claimant to return to work but recommended she gradually increase her activities and move from light to light/medium to medium level work over a 2-week period.

Claimant returned to Dr. Melhorn's office on October 23, 2007. She told him she was making gains and her hands felt good. She was doing light duty work, and she was doing okay with her job. Claimant returned again on December 4, 2007, and she was continuing to do well. Dr. Melhorn found she was at maximum medical improvement and released her from treatment. He did not assign her any permanent work restrictions. Using the *AMA Guides*,¹ Dr. Melhorn found claimant had an impairment of 5.4 percent for each arm for pain, discomfort and loss of sensation, and an impairment of 2.3 percent to each arm for loss of strength. He combined the ratings, giving claimant a 7.7 percent permanent partial impairment to the right upper extremity and a 7.7 percent permanent partial impairment to the left upper extremity.

Claimant returned to Dr. Melhorn for treatment on January 22, 2008. She complained that when she started back to regular work, her left hand started to cramp and she had a pins and needles sensation and burning in her left hand due to holding onto a pressure hose with her left hand. Claimant's physical examination for objective findings

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

fell within a normal pattern, and Dr. Melhorn could not detect any reinjury to either the median or ulnar nerves in her upper extremities. However, because of claimant's subjective complaints, Dr. Melhorn recommended modifications to her work environment to regular work 4 hours per day and then 4 hours per day of an alternate job task.

Claimant saw Dr. Melhorn again on February 14, 2008. She told him she had been laid off as of February 13, 2008. She was still complaining of symptoms in her hands. Dr. Melhorn recommended exercises, strengthening and therapy components that she had been taught in physical therapy. On February 26, 2008, claimant was still complaining of pain in her upper extremities, but Dr. Melhorn found no positive objective findings of nerve injury. Dr. Melhorn said that persistent sensory loss would be in keeping with claimant's carpal tunnel/ulnar nerve surgeries, for which he had previously provided impairment ratings. He did not change his ratings. Dr. Melhorn believed that on February 26, 2008, when he last saw claimant, she was capable of performing substantial, gainful employment despite her bilateral upper extremity injuries.

Dr. C. Reiff Brown, a board certified orthopedic surgeon, examined claimant on December 8, 2008, at the request of claimant's attorney. He took a history from her concerning the development of her bilateral upper extremity injuries and medical treatment of the same. Claimant told Dr. Brown she had ongoing discomfort in her hands and as it became more severe, it traveled upwards to her shoulders. She complained that she has weakness of her grip strength and some loss of movement of the shoulders bilaterally. She complained of a crunching and grinding in her shoulders when she moved them.

After performing a physical examination of claimant, Dr. Brown opined that claimant had reached maximum medical benefit. He rated her as having a 10 percent permanent partial impairment of each upper extremity on the basis of ulnar nerve impingement, a 10 percent permanent partial impairment of each upper extremity on the basis of bilateral carpal tunnel syndrome, a 5 percent upper extremity impairment bilaterally for loss of range of motion, and 6 percent upper extremity impairment bilaterally for crepitus. These values combined to 28 percent permanent partial impairment of the right upper extremity and 28 percent impairment to the left upper extremity.

Dr. Brown admits the *AMA Guides* set out that crepitus should be used in rating upper extremity impairments only when other criteria do not adequately encompass the extent of the impairment. Dr. Brown admitted when he assigned claimant additional impairment for crepitus, he was going against the instruction in the *AMA Guides*. Dr. Brown testified that sometimes crepitus is not caused by a loss of range of motion. He opined that crepitus is a roughness of the surface of the joint caused by something other than what causes loss of range of motion.

Dr. Brown recommended that claimant permanently avoid work that involves frequent use of her hands above shoulder level and frequent reaching away from the body more than 18 inches. She should not lift above shoulder level bilaterally and should avoid

frequent flexion and extension of the wrists greater than 30 degrees, frequent grasping activity, and vibratory hand tools.

Dr. Brown reviewed the task list prepared by Mr. Lindahl and opined that claimant was unable to perform any of the seven tasks on that list, for a 100 percent task loss. He believed that claimant retained the capacity to perform work activity if she would abide by his recommended work restrictions. However, he also believed claimant would have trouble finding a job.

The ALJ ordered an independent medical examination of claimant by Dr. Paul Stein. Dr. Stein was asked to render an opinion concerning causation of claimant's shoulder problems; additional or future medical treatment, if necessary; restrictions; and disability rating. Dr. Stein evaluated claimant on July 23, 2009. Claimant gave Dr. Stein a history of her upper extremity conditions, her work history, and her medical treatment history. Dr. Stein also reviewed claimant's medical records.

After examining claimant, Dr. Stein stated her primary pathology was bilateral carpal tunnel syndrome secondary to overuse of the hands. He was not convinced she had ulnar nerve entrapment but had undergone ulnar nerve decompression and now has irritability of the ulnar nerves at the elbows. He noted she also had soft tissue discomfort extending into the trapezius muscles. Claimant also had decreased range of motion at the shoulders, which he said likely was secondary to soft tissue discomfort, which he opined was related to her work activities.

Dr. Stein believed that claimant was at maximum medical improvement. He rated her as having a 10 percent impairment to each upper extremity for the median nerve and 10 percent for the ulnar nerve for each upper extremity. For decreased range of motion, he rated claimant as having a 1 percent impairment for flexion and a 1 percent impairment for abduction for each upper extremity. These combined for a 21 percent permanent partial impairment to each of claimant's upper extremities.

Dr. Stein recommended work restrictions of no repetitive activity with either hand over shoulder level or fully outstretched, no lifting more than 15 pounds up to chest level with either hand, no repetitive activity with either hand, and avoiding use of vibrating or impacting power tools.

Doug Lindahl, a vocational rehabilitation counselor, met with claimant on September 29, 2009, at the request of claimant's attorney to prepare a work task assessment. Claimant indicated to Mr. Lindahl that she worked for respondent from 1999 to 2008. She had not worked from 1992 until she started at respondent in 1999. Together, claimant and Mr. Lindahl prepared a list of seven tasks that claimant had performed during the time she worked for respondent.

Claimant told Mr. Lindahl she attended school until the 9th grade in Mexico, and that was the extent of her education. Claimant utilized an interpreter during the interview, and Mr. Lindahl had no indication that she could read or write English. Concerning claimant's ability to return to regular work within her work restrictions, Mr. Lindahl stated:

[S]he appears to be an individual with no English skills, no ability to return to her past work, limited to sedentary lifting and avoiding frequent grasping or reaching which, which really in vocational terms is reaching and handling. There are no jobs at the unskilled level that would allow for that only occasional reaching and handling so there, there really are no jobs that she can compete for.²

Mr. Lindahl opined that based on the restrictions of Drs. Brown and Stein, claimant is totally disabled.

Claimant told Mr. Lindahl that she was on unemployment and had been looking for work. She did not describe her job search to Mr. Lindahl. Mr. Lindahl did not conduct a labor market survey in regard to claimant. He testified that he did not think there were any jobs claimant could compete for so did not believe it would do any good to do so.

Steve L. Benjamin, a vocational rehabilitation consultant, met with claimant on February 5, 2010, at the request of respondent. Claimant told him she worked only one job in the 15-year period before her injury, that being the job at respondent. Mr. Benjamin identified 11 tasks that claimant performed in her job.

Mr. Benjamin said that claimant did not have any transferrable skills from her job with respondent, so he opined that if she re-entered the open labor market, she would most likely earn an entry level wage. He further opined that even with her restrictions, claimant "should be able to return to substantial and gainful activity in the open labor market."³ Mr. Benjamin and his staff performed a labor market survey. The employers Mr. Benjamin contacted were told of claimant's restrictions and her inability to read, write or speak English.⁴ Some of the jobs Mr. Benjamin found would not be available to claimant unless she were able to communicate in English. Mr. Benjamin testified he found four employers who said they could work with claimant within her restrictions and also did not require her to speak or communicate in the English language. Those jobs were fast food worker, buffet attendant, production worker, and personal care attendant. The fact that

² Lindahl Depo. at 12.

³ Benjamin Depo. at 12.

⁴ Claimant required an interpreter for her interview with Mr. Benjamin, but she indicated that she had become an American citizen several years before. Mr. Benjamin testified that in order for her to have become a citizen, she would have had to demonstrate the ability to use basic English language skills.

claimant cannot communicate in English does not change Mr. Benjamin's opinion that she is capable of performing substantial and gainful employment.

Claimant received unemployment benefits from March 2008 to December 2009. In order for her to have received unemployment benefits, claimant was required to make an effort to find a job. She told Mr. Benjamin that she had not looked for work of any kind while she was on unemployment but testified at the Regular Hearing that she went to places asking if there was work available.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d provides in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....

(11) For the loss of a hand, 150 weeks.

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

....
(18) Amputation or severance below the wrist shall be considered as the loss of a hand. Amputation at the wrist and below the elbow shall be considered as the loss of the forearm. Amputation at or above the elbow shall be considered loss of the arm. . . .

....
(21) Permanent loss of the use of a finger, thumb, hand, shoulder, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period. As used in this paragraph (21), "shoulder" means the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures.

....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

In *Mitchell*,⁵ the Kansas Supreme Court stated: "K.S.A. 44-510d requires compensation for each scheduled injury when multiple injuries occur within a single extremity." In *Redd*,⁶ an opinion handed down the same day as *Mitchell*, the Kansas

⁵ *Mitchell v. Petsmart, Inc.*, __ Kan. __, Syl. ¶ 1, __ P.3d __ (filed Sept. 10, 2010), 2010 WL 3516155.

⁶ *Redd v. Kansas Truck Center*, __ Kan. __, Syl. ¶ 5, __ P.3d __ (filed Sept. 10, 2010), 2010 WL 3516168.

Supreme Court held: “K.S.A. 44-510d requires compensation for each scheduled injury when multiple injuries occur within a single extremity.”

In *Casco*,⁷ the Kansas Supreme Court stated:

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In *Wardlow*⁸, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

ANALYSIS

If claimant's descriptions of her symptoms, complaints and limitations are totally accepted as fact without regard to the other evidence, and in particular to the other expert opinion testimony, then it would appear that claimant is permanently and totally disabled.

⁷ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 8, 154 P.3d 494 (2007).

⁸ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

However, the greater weight of the credible evidence in this record persuades the Board that claimant is capable of engaging in substantial, gainful employment.

Claimant worked for respondent after her surgeries until she was laid off. It is significant that she left work due to the closing of the slaughter side of the plant—not due to her injuries.

Dr. Melhorn released claimant to regular work activity on December 4, 2007. He subsequently revised her restrictions on a temporary basis but ultimately released her again without restrictions in February 2008. Nevertheless, like the ALJ, the Board is persuaded that based on the opinions of Drs. Brown and Stein, claimant is in need of permanent work restrictions. Their restrictions, however, do not prevent claimant from working. Claimant's ability to access the labor market is further limited by her lack of education, transferable job skills, and inability to communicate effectively in English. Despite these limitations, vocational expert Steve Benjamin opined that there were jobs claimant could perform. Although Mr. Lindahl expressed a contrary opinion, the Board is persuaded that claimant is capable of performing substantial, gainful employment. The test for permanent total disability is whether the injured worker is capable of performing substantial and gainful employment, not whether the worker is likely to find such employment.

The Board likewise agrees with and affirms the ALJ's conclusion that Dr. Stein's rating opinions are the most credible with regard to claimant's percentage of permanent functional impairment. He was the court-ordered neutral examiner and was the last of the three testifying physicians to examine claimant. However, based upon the recent Kansas appellate court opinions in *Redd* and *Mitchell*, those ratings should not have been combined. The award calculation should be modified accordingly.

CONCLUSION

(1) Claimant is capable of engaging in substantial and gainful employment. She is not permanently and totally disabled. Therefore, her permanent partial disability award is limited to her percentages of functional impairment pursuant to the schedules in K.S.A. 44-510d.

(2) Claimant's permanent impairment of function is 10 percent to each forearm for the median nerve entrapment neuropathies, 10 percent to each arm for the ulnar nerve entrapment neuropathies, and 2 percent to each shoulder for loss of range of motion.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 17, 2010, is affirmed in part and modified as follows:

Right Shoulder

Claimant is entitled to 4.5 weeks of permanent partial disability compensation, at the rate of \$310.70 per week, in the amount of \$1,398.15 for a 2 percent loss of use of the right shoulder, making a total award of \$1,398.15.

Left Shoulder

Claimant is entitled to 4.5 weeks of permanent partial disability compensation, at the rate of \$310.70 per week, in the amount of \$1,398.15 for a 2 percent loss of use of the left shoulder, making a total award of \$1,398.15.

Right Forearm

Claimant is entitled to 1 week of temporary total disability compensation at the rate of \$310.70 per week in the amount of \$310.70 followed by 19.90 weeks of permanent partial disability compensation, at the rate of \$310.70 per week, in the amount of \$6,182.93, for a 10 percent loss of use of the right forearm, making a total award of \$6,493.63.

Left Forearm

Claimant is entitled to 1 week of temporary total disability compensation at the rate of \$310.70 per week in the amount of \$310.70 followed by 19.90 weeks of permanent partial disability compensation, at the rate of \$310.70 per week, in the amount of \$6,182.93, for a 10 percent loss of use of the left forearm, making a total award of \$6,493.63.

Right Arm

Claimant is entitled to 1 week of temporary total disability compensation at the rate of \$310.70 per week in the amount of \$310.70 followed by 20.9 weeks of permanent partial disability compensation, at the rate of \$310.70 per week, in the amount of \$6,493.63, for a 10 percent loss of use of the right arm, making a total award of \$6,804.33.

Left Arm

Claimant is entitled to 1 week of temporary total disability compensation at the rate of \$310.70 per week in the amount of \$310.70 followed by 20.9 weeks of permanent partial disability compensation, at the rate of \$310.70 per week, in the amount of \$6,493.63, for a 10 percent loss of use of the left arm, making a total award of \$6,804.33.

The above combine for a total due claimant of \$29,392.22, all of which is due and owing less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for the Self-Insured Respondent
Brad E. Avery, Administrative Law Judge